

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

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**FEDERAL COMMUNICATIONS COMMISSION**  
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In the Matter of )  
)  
Implementation of Sections )  
of the Cable Television )  
Consumer Protection and )  
Competition Act of 1992: )  
)  
Rate Regulation )

MM Docket 92-266

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**FX NETWORKS, INC.'S COMMENTS IN SUPPORT OF CONTINENTAL  
CABLEVISION'S PETITION FOR RECONSIDERATION OF SIXTH ORDER**

FX Networks, Inc. ("FX") supports the suggestions made by Continental Cablevision ("Continental") in its Petition for Reconsideration of the Sixth Order. In its filing, Continental aptly describes the effects of the Commission's going forward rules on cable operators. FX wishes to describe to the Commission the two classes of programmers that have been created by the rules: (1) established programmers who are now permanently entrenched in existing, high-penetration tiers of programming and who will have little incentive to improve their offerings and (2) new programmers who, regardless of the excellence of their programming, will have limited, if any, opportunity to market their offerings as part of an established tier, or even a tier with any brand-name programmers. The effect of the dual classes of citizenship on new programmers is devastating.

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We understand and support Continental's assertion that all operators should receive some flexibility in the establishment of new product tiers. Nevertheless, we speak from a programmer's perspective, alone.

Continental's suggestion that all operators be permitted to migrate up to four services to new product tiers would go a long way toward removing the current unintended, but clearly-existent, regulatory bias against new general interest cable networks. Limited migration would help to reestablish a pro-competitive environment for new cable networks, particularly new general interest networks which by their very nature have broader audience appeal but also higher associated programming costs than niche services. We, at fX, do not underestimate the value of the myriad of new, mostly niche channels newly being offered to viewers. What we strongly object to is a regulatory structure which -- no matter how inadvertently -- has the effect of fostering only niche services while effectively foreclosing any competition to entrenched basic cable services.

First, permitting operators to migrate existing services from regulated tiers would provide potential openings on high-penetration, regulated tiers for new programming services which may be attractive to a broader base of viewers than many services now on regulated tiers. New programming services should be able to earn their way onto regulated tiers based on the merits of their programming. Put simply, if viewers vote for fX (with their feet or, more likely, their remotes), we should not be shut out of "already full" basic tiers. Viewers would benefit, in the first instance, because cable operators would be free to place networks with the most popular appeal on lower

tiers and, in the second instance, because competition among programmers for positions in high-penetration tiers would ensure that existing programmers maintain or improve their programming quality in order to remain a part of the cable system's core offerings. The Commission created new product tiers expressly to promote programming competition. That goal is not being fully met by existing regulations which have completely prohibited migration in most cable systems.

Second, the movement of existing services to new product tiers will allow all operators much-needed flexibility to effectively market new product tiers. The arbitrary placement of programming services into regulated or into new product tiers based solely on a programming service's "birthdate" is neither consumer friendly nor cable marketer friendly. Tiers consisting entirely of new, unrelated niche services are unlikely to achieve penetration exceeding 30% at the outside. While a low-cost, niche service may be able to survive without access to 70% of potential cable viewers, a broad-based service clearly cannot. Yet, the current going-forward regulatory structure provides strong disincentives for either the addition of fX to regulated tiers or the creation of new product tiers which achieve anywhere near the level of penetration needed to support broad-based, advertiser-dependent cable channels.

The experience of fX to date with the Commission's going-forward rules supports our earlier assertions that the 30 cent set-aside for licensing fees which incents operators to add only no-cost or low-cost services to regulated tiers in combination with the prohibition on any migration whatsoever from regulated tiers in

most cable systems produces a formidable barrier to the success of new general interest cable networks.

We fully appreciate the difficulty of the Commission's task in crafting going-forward rules. Further, we know it is not the Commission's role to guarantee the commercial success of new cable networks. But, despite very competitive ratings and favorable demographics and despite the acknowledgment by cable systems of the value of our service, operators continue to be disincented from adding fX because of the current going forward rules.

Likewise, we understand the Commission's concern that regulated tiers not be "devalued" by the wholesale stripping of existing services. However, the migration of a limited number of services from regulated tiers strikes a balance between the Commission's desire to preserve regulated tiers for consumers and one of the Cable Act's overarching goals: continued programming diversity for consumers. As we have suggested in earlier comments, the Commission could require that any services removed from regulated tiers be replaced by new programming services to ensure no net diminution of basic.

In conclusion, we respectfully request that the Commission re-examine its "no-migration" policy to allow limited movement into and out of regulated service tiers. New programming services and viewers, alike, will be the beneficiaries.

Respectfully submitted,

fX NETWORKS, INC.

By Mindy Herman *by fx*  
Mindy Herman  
Sr. Vice President  
Business & Legal Affairs

Dated: February 3, 1994

CERTIFICATE OF SERVICE

I, Peggy E. Gelinas, a secretary at the law firm of Hogan & Hartson L.L.P., hereby declare that the foregoing Comments in Support of Continental Cablevision's Petition for Reconsideration of Sixth Order was sent on this 3rd day of February, 1995, by first class mail, postage pre-paid, to the following:

Eric E. Breisach, Esq.  
Christopher C. Cinnamon, Esq.  
Howard & Howard  
The Kalamazoo Building, Suite 400  
107 W. Michigan Avenue  
Kalamazoo, MI 49007  
(Attorneys for The Small Cable Business Association)

Patrick A. Miles, Jr., Esq.  
Varnum, Riddering, Schmidt & Howlett  
P.O. Box 352  
Grand Rapids, MI 49501-0352  
(Attorney for West Michigan communities)

Peter H. Feinberg, Esq.  
Dow, Lohnes & Albertson  
1255 23rd Street, N.W., Suite 500  
Washington, D.C. 20037  
(Attorney for Home Shopping Network, Inc.)

Robert J. Sachs, Esq.  
Paul Glist, Esq.  
Cole, Raywid & Braverman  
1919 Pennsylvania Avenue, N.W., Suite 200  
Washington, D.C. 20006  
(Attorney for Continental Cablevision, Inc.)

Sue D. Blumenfeld, Esq.  
Willkie, Farr & Gallagher  
1155 21st Street, N.W., Suite 600  
Washington, D.C. 20036  
(Attorney for QVC, Inc.)

William E. Cook Jr., Esq.  
Arnold & Porter  
1200 New Hampshire Avenue, N.W.  
Washington, D.C. 20036  
(Attorney for the National Association of  
Telecommunications Officers & Advisors)

William Malone, Esq.  
Miller & Holbrooke  
1225 19th Street, N.W., Suite 400  
Washington, D.C. 20036  
(Attorney for the City of Tallahassee)

Michael S. Schooler, Esq.  
National Cable Television Association, Inc.  
1724 Massachusetts Ave., N.W.  
Washington, D.C. 20036  
(Attorney for Cox Communications, Inc.)

Barbara K. Gardner, Esq.  
Leventhal Senter & Lerman  
2000 K Street, N.W., Suite 600  
Washington, D.C. 20006  
(Attorney for Children's TV Workshop)

  
Peggy E. Gelinas